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SUPREME COURT, U.S.

No. 81-5634

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RICKY WAYNE TISON and
RAYMOND CURTIS TISON,

Petitioners

v.

STATE OF ARIZONA,

Respondent

PETITIONERS' REPLY TO THE RESPONSE BY THE STATE OF ARIZONA TO THE JOINT PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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REASONS FOR GRANTING THE WRIT

I. The decisions below in the petitioners' cases present the issue of whether someone not proven to have participated in the actual killing or to have intended death can constitutionally be executed.

In its Response to petitioners' joint request for a writ of certiorari, Arizona now argues at length that the Tisons' involvement in the killings was more significant than was proven or even argued at trial. In sharp contrast to Arizona's present position, its prosecutor repeatedly argued to the jury in both trials that Ricky and Raymond were not the actual killers but were guilty under a combination of vicarious liability and felony murder rules. In Ricky Tison's trial, the prosecutor argued, "His participation was to pull a gun on the people and to aid in the robbery and kidnap," (Ricky's Tr. 2/27/79 at 581), and "Ladies and Gentlemen, the defendant in this case participated. He was an aider and abettor. He conspired with the persons who did the murders. He is responsible for those murders ..." (Id. at 598). See also id. at 577, 584-85, 588, 626. In Raymond Tison's trial the prosecutor argued "...[I]n this case we have a situation where the defendant is a conspirator with other persons and those other persons killed somebody during these offenses." (Raymond's Tr. 3/2/79 at 395). See also id. at 386, 392-93. The judge who sentenced petitioners found as a mitigating circumstance the fact that they were convicted "under the felony murder instructions." (64a). Finally, the Supreme Court of Arizona specifically found, in affirming their sentences of death, "That they did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance that these homicides would take place or that they did not actually pull the triggers on the guns which inflicted the fatal wounds is of little significance." (32a-33a).

Even the State concedes, as it must, that the Arizona Supreme Court has posed and decided the issue of the propriety of the death sentence for one not proven to have personally killed or intended death. (Response at 3). Although respondent continues to spar with the evidence presented in the case, it states that the Arizona Supreme Court "held that even if Petitioners were right, it would not relieve them of culpability." (Id.)

Arizona, having prosecuted and convicted the Tisons under one set of facts and theories of liability, cannot now properly jettison those facts and theories solely in order to gain the presumed tactical advantage of more closely associating Ricky and Raymond with actual participation in the killings.

Arizona, in its attempt to distinguish these cases from Lockett v. Ohio, 438 U.S. 586 (1978) and Enmund v. Florida, 399 So.2d 1362 (1981), cert. granted, No. 81-5321, argues that Lockett involved an accidental killing and Enmund "apparently was not present" when the killings occurred. (Response at 3-4). However, an analysis of the record in those cases demonstrates that there was actually more evidence available concerning intent to murder and participation in the killings in both those cases than is present here. In Lockett v. Ohio, supra, Justice White noted that "the facts in both of these cases might well permit the inference that the petitioners did in fact intend the death of the victims," id. at 627 (White, J., concurring in part, dissenting in part, and concurring in the judgment). Justice Blackmun noted that the witness who testified that the killing had been accidental was none other than the triggerman. Id. at 614 n.1 (Blackmun, J., concurring in part and concurring in the judgment). Similarly, in Enmund v. Florida, supra, although the Florida Supreme Court concluded that the jury probably inferred that Enmund was not present at the scene of the killings, Enmund

v. State, supra 399 So.3d at 1370, it appears that some evidence was presented that Enmund was in fact the actual killer. See id. at 1372. This Court properly considered both these cases in accordance with the theories upon which they were prosecuted and argued in the state courts on appeal. Cf. Robinson v. California, 370 U.S. 660 (1962). This Court can do no less here.

There is absolutely no evidence that either Ricky or Raymond Tison killed anyone. The overwhelming and unrebutted evidence presented at trial was that Gary Tison and Randy Greenawalt killed all the victims. (Petition at 11; 3a). That is the theory upon which these cases were submitted to the jury and to the Arizona courts. That is the theory upon which this Court should decide these petitions.

Arizona's claim that petitioners were given "individualized sentencing consideration" indicates that it misses the thrust of petitioners' argument on this point. (Response at 4-5). The State does not dispute the fact that aggravating circumstances which pertained to the actions of the actual killers were applied to petitioners. (Petition at 17). The State feels that, nevertheless, "[p]etitioners were given all the individualized consideration to which they were entitled" (Response at 5). The issue remains, nevertheless, whether the consideration the Tisons received is constitutionally sufficient.

Finally, contrary to the State's assertion (Response at 6), petitioners never disputed the proposition that a defendant should bear the burden of proving mitigating circumstances. What the Tisons argue is that it is constitutionally impermissible to rephrase a factor which in substance can only properly be considered an aggravating circumstance and make the defendant prove the converse as a mitigating circumstance. The degree of a defendant's participation in a crime, upon which Arizona requires a capital defendant bear the burden of proof, is such a factor. See Laws 1973, Ch. 138, §5, Ariz. Rev. Stat. Ann. §13-454(F)(3) (Supp.. 1957-1978) (Repealed 1978) (107a).

This Court has recently indicated its willingness to decide whether someone can constitutionally be executed if he has not been proven to have personally killed or intended death, by grating certiorari in Enmund v. Florida, No. 81-5321. Petitioners would like to assist in the resolution of this issue by presenting this Court with a thorough argument, based on the Anglo-American history of the felony murder and aiding and abetting rules, against the application of the death penalty in the circumstances presented by this case.

II. Petitioner Ricky Tison's case presents this Court with an excellent opportunity to determine whether a mere failure by the defense attorney to use the single word "Miranda" constitutes a waiver of an otherwise fully litigated constitutional issue, and to reaffirm the standards for determining the voluntariness of a statement.

Arizona's argument that both Ricky Tison and this Court have misread a crucial distinction historically made by its courts between presentation of the "voluntariness" issue on the one hand and the nonwaiver of Miranda rights on the other is supported neither by logic nor by the very decisions of its own Supreme Court it excerpts at such length. (Response at 13-16). As these excerpts show, and as the Arizona Attorney General implicitly conceded in briefing before the Arizona Supreme Court (a concession his office now apparently regrets), in Arizona the question of compliance with Miranda has since that decision been subsumed within the broad issue of voluntariness exactly as Ricky Tison's attorney argued in the suppression hearings. See, e.g., State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978), cited by Respondent at 15.

Arizona's argument on this point represents a somewhat belated conversion from an argument of State compliance with Miranda (Brief for Appellee at 17-23, State v. Ricky Wayne Tison, No. 4612 (Ariz.)) to a wholly opportunistic reliance on a waiver argument following the Arizona Supreme Court's murky pronouncement on this point in the decision below. (13a).

In any event, the issue presented here is not whether Ricky Tison's statements were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966),[1] but whether the finding of the Arizona Supreme Court that these arguments had been waived presents an issue worthy of review by this Court. Ricky Tison contends that since he did not waive the Miranda issues, his case presents an excellent vehicle for clarifying the proper standards for finding an intentional waiver by defense counsel of federal constitutional issues.

Whether there was compliance with Miranda was the subject of questioning by both the prosecutor (122a-124a, 138a, 139a, 152a, 153a, 160a-161a) and the defense attorney (128a, 164a) at the suppression hearing. Ricky's attorney questioned one of the officers concerning Ricky's refusal to sign a waiver of what were obviously Miranda rights (164a), and argued in closing that "the action of refusing to sign that waiver indicates that he either did not understand the rights or he wasn't ready to waive them." (167a). The trial judge's finding that "I think they understood their rights and waived them" was not an "after-

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[1] Arizona claims that at least the last of the three statements obtained from petitioner Ricky Tison was elicited in compliance with Miranda v. Arizona, 384 U.S. 436 (1966), because it was "separated substantially by both time and distance from the original questioning, conducted by a different person from a different agency, and preceded by a completely renewed advisement of rights." (Response at 11). Therefore Arizona asserts taht this statement is comparable to that found admissible in Michigan v. Mosley, 423 U.S. 96 (1975). Even if Arizona's contention were factually accurate, the first two statements elicited from Ricky Tison remain undefended, and thus the issue of whether the State of Arizona complied with Miranda would remain. However, Ricky Tison's third statement is not comparable to that found admissible in Mosley. In Mosley the issue presented to the Court was whether an interrogation by a Detective Hill was a per se violation of Miranda after the defendant had invoked his right to remain silent during an earlier interrogation by Detective Cowie. This Court specifically stated "[i]n short, there is no claim that the procedures followed during Detective Hill's interrogation of Mosley, standing alone, did not fully comply with the strictures of the Miranda opinion." Michigan v. Mosley, supra, 423 U.S. at 98. Here, on the contrary, counsel vigorously argued below that the procedures followed during all three interrogations of petitioner Ricky Tison were in violation of Miranda. Brief for Appellant at 36-45; Reply Brief for Appellant at 12-18, State v. Ricky Wayne Tison, No. 4612 (Ariz.).

thought," as claimed by Arizona (Response at 13) but was clearly in response to Ricky Tison's attorney's argument that the interrogation following Ricky's refusal to sign the waiver violated Miranda. The issues were then fully argued by both sides at the state appellate level. Arizona now grudgingly explains that the Attorney General merely "responded to the issues as framed by petitioner in the appeal and in doing so overlooked the waiver." (Response at 16). In fact, as the record demonstrates, both parties clearly believed that the Miranda issues had been properly preserved until the Arizona Supreme Court inexplicably held otherwise.

That Court's decision gives no indication of how defense counsel had knowingly and intentionally waived this fully litigated issue, but merely said that there was a "failure to raise these issues at the suppression hearing." (13a). The only possible basis for this holding is that at the suppression hearing defense counsel did not use the word "Miranda" (although the prosecutor did on several occasions, 124a, 137a-138a, 153a) but instead spoke of "[Ricky Tison's] rights," and "invoke[ing] his right to remain silent." (165a -167a).

No precedent cited by respondent supports a finding of waiver under those circumstances. The objection was neither untimely as in Henry v. Mississippi, 379 U.S. 443 (1965), nor apparently deliberately bypassed as in Estelle v. Williams, 425 U.S. 501, 510 (1976). Picard v. Connor, 404 U.S. 270 (1971), cited by Arizona for the proposition that failure to recite in haec verba results in the waiver of constitutional rights (Response at 17), in fact stands only for the proposition that "the substance of a federal habeas corpus claim must first be presented to the state courts." Id. at 278 (emphasis added). Here, the essence of the Miranda claim, and everything but the invocation of the word "Miranda" by petitioner's attorney, was presented, litigated and decided below. Thus the case presents an

excellent opportunity for this Court to determine whether a state court may properly find a waiver of federal constitutional rights under such circumstances.[2]

Finally, respondent argues that this Court need not take this occasion to re-emphasize the standards for determining when a confession is voluntary "because the only reasoned conclusion available is that Petitioner's statements were voluntary." (Response at 18). Arizona's "conclusion" on this point is remarkable in view of the record of Ricky's custodial questioning. In flat contradiction to Arizona's factual assertions (Response at 18), the record indicates that Ricky Tison was not only nude when questioned but, as the Arizona Supreme Court pointed out, lacked even a blanket to wrap around him at the third interrogation (15a). Moreover, Arizona's superficial reading of Malinski v. New York, 324 U.S. 401 (1945), as according "little weight" to the fact that the defendant, Malinski, was stripped prior to his confession, is refuted by the very language of that case. Justice Douglas' opinion, strongly concurred in by Justice Frankfurter, clearly found Malinski's nudity to be a major

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[2] Henry v. Mississippi, supra, also implies that where a state procedural rule is not "clearly announced to defendant and counsel," the State's insistence on compliance may not serve a legitimate state interest that outweighs a defendant's interest in vindicating his constitutional rights. Id. at 447, 448 n.2. Petitioner claims that under Arizona law, prior to his case, counsel could assume that a request for a voluntariness hearing would be treated as a request for a hearing on Miranda issues as well. (Joint Petition at C18). Arizona, however, claims that its courts have always maintained a distinction between voluntariness and Miranda issues. (Response at 14).

In support of this argument, Arizona asserts that this Court misread the case law that served as the predicate for the recent decision of Edwards v. Arizona, ___ U.S. ___ , 68 L.Ed.2d 378 (1981). Arizona then proceeds to attempt to relitigate that case (in addition to gratuitously attacking the Miranda decision it lost fifteen years ago) by discussing why "'voluntary' means different things in different contexts." (Response at 13-14). Arizona finds distinctions between the treatment of voluntariness and Miranda issues in Arizona that were not visible to this Court in Edwards v. Arizona, supra, 68 L.Ed.2d at 386, and that are confusing even as set forth in the Response. Even if Arizona were correct that the distinctions had been made, the procedural rule was obviously not clear enough to allow forfeiture of petitioners' rights under Henry.

element of the coercion applied to him. See id. at 403, 405, 407, 417; Miranda v. Arizona, supra, 384 U.S. at 452 n.17.[3] Furthermore, Malinski's confession was made six hours after he had been given his shoes, socks, underwear, and a blanket. Malinski v. New York, supra, 324 U.S. at 403. Ricky Tison's statements were much closer to the "clear case" of coercion there described by this Court, "the product of persistent questioning while [he] stood stripped and naked ..." Id. at 405.

Lastly, Arizona cites Haynes v. Washington, 373 U.S. 503 (1963), a pre-Miranda decision, for the proposition that "substantial deference will be given to the findings of the trial court, even on the ultimate question of voluntariness." (Response at 18). While that Court observed that "the determination of the trial judge ... may be entitled to some weight even with respect to the ultimate conclusion on the crucial issue of voluntariness", it flatly stated that it was "required" to make an "independent determination" as to the existence of coercion. It then found that Haynes' confession, from "the facts presented," had been coerced. Id. at 515. Ricky Tison asks this Court to grant review in order to reinvigorate this basic standard in the context of his case.

III. The Arizona Supreme Court's failure to review the correctness of the conspiracy instructions given to the juries in the Tisons' cases presents important issues concerning the requirements of basic due process of law in a capital case.

Arizona concedes that the Arizona Supreme Court "declined to go into whether or not the four formal elements of the crime of conspiracy had been enunciated ..." in the jury instructions concerning conspiracy. (Response at 19). Petitioners' contention on this issue is not fundamentally challenged and the

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[3] Arizona's citation to United States v. Duvall, 537 F.2d 15, 23 (2d Cir.), cert. den., 426 U.S. 950 (1976) is surprising in view of the fact that the Circuit Court there stated "Moreover while the strip search in this case was an unnecessary indignity, it is a long way from the conduct in Malinski v. New York ... where the police kept Malinski naked for three hours and only partially dressed for another seven, during which period his confession was obtained."

question remains whether this failure of appellate review on the correctness of fundamental jury instructions in a capital case violates due process of law.

Arizona attempts to characterize this issue as wholly one of state law both by arguing that the Arizona Court reviewed other aspects of the conspiracy instructions and by reiterating the principle that state courts are the ultimate authority concerning construction of state law. (Response at 19). However, the fact that the Arizona Court reviewed one aspect of the conspiracy instructions does not alter the significance of its refusal to review the Tisons' "arguments that the instruction did not reflect the law of the substantive crime of conspiracy." (17a, 39a). Furthermore, the issue of what a state interprets its laws to be is entirely different from the issue presented when a state declines to even render an interpretation of those laws. While the former may ordinarily be a question for the state courts, the issue of whether state laws and procedures comport with due process is a federal question. See Mullaney v. Wilbur, 421 U.S. 684, 691-92 (1975).

IV. The Tisons' cases present the issue of how attenuated a causal connection there may be between the defendant's acts and the victim's death before due process bars the State from holding him vicariously liable for murder.

The Tisons as petitioners maintain that due process places limits on the extent to which a State may find one criminally liable for the acts of another, and that the jury instructions in their cases permitted the juries to exceed these limits. Therefore, their cases present this Court with an opportunity to clarify those limits.

Arizona claims that this Court in Pinkerton v. United States, 328 U.S. 640 (1946) determined this issue. This argument is in error. In Pinkerton, this Court held that someone charged with and convicted of the crime of conspiracy could also be held responsible for substantive crimes committed by his co-conspirators in furtherance of the conspiracy. The Tisons, however, were

neither charged with nor convicted of the crime of conspiracy. Their murder convictions cannot therefore find support in Pinkerton. Rather, "conspiracy" was but one of a potpourri of vicarious liability theories and broad definitions offered to the juries to link together as they saw fit if they intended to convict petitioners of murder. As noted in the Petition, the trial court's instructions would permit someone who put gas in the getaway car before the prison escape to be convicted of first degree murder. (Joint Petition at C24). Petitioners therefore believe that this case presents a clear-cut opportunity for this Court to clarify the due process limits on such vicarious liability.

When petitioners originally filed their joint petition for writs of certiorari on October 27, 1981, it was accompanied by a motion to expedite consideration and to consolidate for hearing with Enmund v. Florida, No. 81-5321, cert. granted October 19, 1981. This Court denied the motion on November 2, 1981. If the Court decides to review their cases on the Eighth Amendment issue, petitioners remain fully prepared to meet whatever expedited briefing schedule the Court may require so as to enable their cases to be argued at the same time as Enmund v. Florida.

CONCLUSION

For the reasons stated above, Petitioners request that this Court grant their joint petition for writs of certiorari.

Respectfully submitted, this 16th day of December 1981.

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